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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

JOHN D. RANDALL,

Petitioner,

vs.

W.W. REYNOLDSON; CLAY LeGRAND; WARREN J. REES; HARVEY UHLENHOPP; DAVID HARRIS; MARK McCORMICK; ROBERT G. ALLBEE; ARTHUR A. McGIVERIN; JERRY L. LARSON,

Respondents

IN THE MATTER OF SUSPENSION TO PRACTICE BEFORE THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF IOWA OF JOHN D. RANDALL

JOHN D. RANDALL,

Petitioner

IN THE MATTER OF SUSPENSION TO PRACTICE BEFORE THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF IOWA OF JOHN D. RANDALL

JOHN D. RANDALL

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

(1) Can a lawyer who has been disbarred in a State Court proceeding violative of due process rights guaranteed by Fourteenth Amendment of the Constitution of the United States secure vindication of these constitutional rights in Federal Court under 42 USC, Section 1983? (2) Is the Iowa Code of Professional Responsibility as applied to this factual situation void for vagueness and indefiniteness in that it imports all Ethical Considerations into disciplinary grounds and does not afford fair and adequate notice of prohibited conduct which can be punished by disbarment?

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The Petitioner, John D. Randall, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, the orignial opinion having been entered on February 21, 1981, and rehearing having been denied on March 3, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A. hereto. Rehearing en banc was denied on March 3, 1981. The District Court opinion in U. S. District Court, Northern District, Cedar Rapids, Iowa, John D. Randall, Plaintiff, v. W. W. Reynoldson, et al, No. 80-13 (8th CCA No. 80-1451), is attached as Appendix B. The Order of the U. S. District Court, Northern District, Cedar Rapids, Iowa, on disbarment dated May 20, 1980, in Case No. Misc-80-6(8th CCA No. 80-1545), is attached as Appendix C. The

Order of the U.S. District Court, Southern District of Iowa, on disbarment dated January 17, 1980, in Case No. Misc-1-20(8th CCA No. 80-1254), is attached as Appendix D.

JURISDICTION

The Petitioner for Rehearing was denied by the Eighth Circuit on March 3, 1981. This Petition is filed within ninety(90) days of that date. The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 19(1)(r) and 28 U.S.C., Section 1254(1). Jurisdiction in the Courts below was predicated on 43 USC, Section 1983, and 28 USC, Section 1343(3). In addition, the United States District Courts for the Southern District and Northern District of Iowa entered Orders barring Petitioner from practicing law in such Districts. Direct appeals of these Orders were taken to the Eighth Circuit.

QUESTIONS PRESENTED

(1) Can a lawyer who has been disbarred in a State Court proceeding violative of due process rights guaranteed by Fourteenth

Amendment of the Constitution of the United States secure vindication of these constitutiona rights in Federal Court under 42 USC, Section 1983?

(2) Is the Iowa Code of Professional Responsibility as applied to this factual situation void for vagueness and indefiniteness in that it imports all Ethical Considerations into disciplinary grounds and does not afford fair and adequate notice of prohibited conduct which can be punished by disbarment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution, Section 1:

"...(N) or shall any state deprive any person of life, liberty or property, wihtout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C., Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subject, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C., Section 1343:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by an person:...

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any rights privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

IOWA CODE OF PROFESSIONAL RESPONSIBILITY
(Appendix E)

STATEMENT OF THE CASE

John D. Randall, Petitioner herein, a practicing lawyer for many years and an ex-president of the American Bar Association, was disbarred by the Supreme Court of Iowa on November 14, 1979. See Committee on Professional Ethics v. Randall, 285 N.W. 2d 161 (Iowa 1979). Petition for Certiorari was denied by the United States Supreme Court on May 12, 1980. After the action by the Supreme Court of Iowa, the United

States District Court for the Southern District of Iowa entered an Order barring Randall from practicing law in the Southern District of Iowa and revoking his certificate to practice law in the Southern District of Iowa on January 17, 1980. The United States District Court for the Northern District of Iowa on May 20, 1980, entered a similar Order barring Randall from practicing law in that Court. The Orders simply accepted the conclusion of the Iowa Supreme Court without the consideration of the issue de novo by the District Courts. Petitioner appealed these Orders of disbarment directly to the Eighth Circuit Court of Appeals.

Meanwhile, on February 1, 1980, Petitioner filed a Petition for Declaratory Relief and to Compel Issuance of a License to Practice Law in the State of Iowa in the United States District Court for the Northern District of Iowa against each Iowa Supreme Court Judge. This action was brought under the provisions of 42 U.S.C., Section 1983, and 28 U.S.C.,

Section 1343(3). This action was dismissed, and Petitioner appealed this judgment to the Eighth Circuit Court of Appeals. At the Court of Appeals, the three cases were consolidated, and Petitioner was denied relief by the Eighth Circuit Court of Appeals. In addition to denying him such relief, the Eighth Circuit Court of Appeals also entered an Order of Disbarment.

It is the position of Petitioner herein that he has never had a fair hearing with due consideration given to his Constitutional rights by any judicial tribunal up to this point. The actions of the Iowa disciplinary agencies and the opinion of the Supreme Court of Iowa violated Petitioner's rights of due process both procedurally and substantively. Further, a regulation was applied retroactively which, if it does not amount to an ex post facto law, would at least amount to a violation of due process. Notwithstanding the violation of Petitioner's Constitutional rights in the State of Iowa, neither the Federal District

Court for the Northern District of Iowa or the Southern District of Iowa would allow Petitioner a hearing and an opportunity to show how his Constitutional rights had been violated. These actions were affirmed by the Eighth Circuit Court of Appeals, and Petitioner now seeks review at this level. Petitioner's rights of equal protection under the law were also violated by these disbarment orders of the State Court of Iowa.

THE FACTUAL BACKGROUND

Petitioner met Lovell Myers in the early 1940's and represented him in a 1943 divorce. In 1946, Petitioner and Myers became associated in a farming venture which lasted until Myers' death in 1976. Myers would manage the farming operations and Petitioner managed the financial affairs, tax work, and real estate transactions of the joint venture. Petitioner and Myers transferred all farm land to Myers Farms, Inc., in 1967. This corporation had been formed in 1952 and Petitioner and Myers each owned 50% of the stoc

Gilbert Morningstar was employed as a farm worker and foreman of the business from 1946 until 1974 and purchased eighty acres of farm property in 1956. The eighty acres was farmed by the corporation and there was dispute as to whether Morningstar had been acting as an agent of the corporation in purchasing the property or for himself. In 1973, Morningstar discovered that a warranty deed had been recorded to such eighty acres from himself and his wife to Myers Farms, Inc., and that a $90,000.00 mortgage had been placed on the property. Morningstar confronted the Petitioner and Myers and accused Myers of forgery of the warranty deed. Subsequently, Myers Farms, Inc., quitclaimed the property to Morningstar. Morningstar continued to work for Myers Farms, Inc. In 1974 he brought suit against Myers, the corporation, and Petitioner.

Myers asked Petitioner to prepare a Will leaving all of his property to Petitioner. The Will was prepared, signed, and witnessed.

At this time, Petitioner did not think he would outlive Myers, as Myers was seven years younger than Petitioner. The date of this Will was March 14, 1973. Petitioner continued to handle the Morningstar litigation which had been brought against Petitioner, Myers, and the corporation.

On February 18, 1976, Myers died, and Petitioner offered the Will for probate. Myers only child, Marie Jensen, brought suit to set aside the Will. As a part of such contest, she filed a complaint against Petitioner with the standing committee on professional ethics and conduct of the Iowa State Bar Association. The Morningstar suit and the Will contest resulted in the initiation of disciplinary proceedings which led to the revocation ofhis license to practice law.

By letter of September 28, 1977, the Committee on Professional Ethics and Conduct informed Petitioner of its determination to file a Complaint. Petitioner was not advised

of any Complaint other than that relating to the Myers Will and permitted the Ethics Counsel of the Committee to inspect files and photocopy records. The Committee filed a two-count Complaint with the first count alleging ethical violations involving the Myers Will and the second count alleging conflict of interest by Petitioner in the representation of Myers and Myers Farms, Inc. Petitioner denied the alleged ethical violations and by Motion of July 23, 1978, raised constitutional objections to the committee's retroactive application of amended ethical considerations and disciplinary rules relating to the Myers Will. He also objected to the Ethics Counsel visiting Petitioner's offices for the purported purpose of investigation of the Will matter when at that time, unknown to the Petitioner, the Complaint had been drawn in two counts and the Ethics Counsel was also acting as prosecutor to the alleged conflict of interest matter. On February 27, 1979, the Commission found Petitioner guilty and recommended dis-

barment.

Petitioner appealed to the Supreme Court of Iowa. On November 14, 1979, the Supreme Court of Iowa entered an opinion and order revoking Petitioner's license to practice law. The Court refused to consider Petitioner's due process arguments even thought the Petitioner had raised these constitutional objections by pleadings and oral submission before the Committee and the Supreme Court of Iowa. The Supreme Court of Iowa considered that the due process arguments had been waived.

Petitioner filed a suit under 42 U.S.C. 1983 to have a Federal Judge review the denial of due process rights and also raise the due process issue in the Federal Court action seeking his disbarment. These pleas were rejected and the Eighth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1. A lawyer who has been disbarred in a State Court proceeding violative of due process rights guaranteed by the Fourteenth Amendment of the Constitution of the United

States should be able to secure vindication of those constitutional rights in Federal Couet under 42 U.S.C., Section 1983.

The Appeal involves the legality and constitutionality of the action of the Greivance Commission of Iowa as well as an opinion by the Iowa Supreme Court which disbarred from the practice of law John D. Randall, who is now aged 81, a former president of the American Bar Association and a former chairman of the House of Delegates of the American Bar Association, and the founder and first chairman of the Section of General Practice of the American Bar Association. The members of the Grievance Commission seemed to manifest personal antipathy against Petitioner herein throughout his proceeding. He did not get a fair hearing and his constitutional rights of due process were violated in several particulars. He was treated differently than other lawyers and his Equal Protection Rights were violated. Further, and perhaps the most egregious error,

a standard of conduct promulgated in 1977 was used as a basis of disbarment for actions taken by Petitioner in 1973. Petitioner raised issues to cast doubt upon the fairness of the hearing and these issues were squarely before the Grievance Commission. However, the Supreme Court of Iowa giving a de novo review to the recommendation of disarment pursuant to its Rules, stated the following regarding the due process objections to Petitioner:

> "We think Randall's due process argument should have been submitted to the Commission, and certainly should have been included as a point in his brief in this submission. Because he failed to do either, we considered the due process argument waived." 285 N.W. 2d at 165. (Emphasis supplied)

It is submitted by the Petitioner herein that there should be a remedy available in Federal Court for one who has lost the valuable right to practice law through a hearing that has been violative of constitutional guarantees. The practice of law is not a matter of grace or privilege; it is a matter

of right for qualified individuals. See Baird v. Arizona, 401 U.S. 1, 8 (1971). Accordingly, the deprivation of this valuable property right without procedural due process should be a wrong that can be righted in Federal Court.

A precedent for an action such as the one involved herein under 42 U.S.C., Section 1983 is Peterson v. Shearan, 474 F. Supp. 1215 (July 25, 1979) which had been brought by a disbarred lawyer under similar circumstances. The District Judge in this case stated as follows:

> ". . . Although the case law overwhelmingly supports very limited Federal Court Review of State Court disciplinary proceedings, the Eighth Circuit, in a footnote in Goodrich v. Supreme Court of South Dakota, 511 F. 2d 316, 318, no date (Eighth Circuit 1975), indicated that a Federal Court is not entirely without jurisdiction to consider some claims arising out of a state disciplinary action proceeding:
>
> > '8. In Jones v. Hulse, . . . we declined to entertain an action alleging violation of 42 U.S.C., Section 1983 where the claims raised had been previously decided by the State Court on the ground the Federal Courts are without jurisdiction to review, in an Appellate capacity,

State Courts. It is clear from the cases cited in Jones, however, that where the federal action is brought under 42 U.S.C., Section 1983 the Federal Court does have jurisdiction to consider the constitutional claims not previously decided by the State Court. 28 U.S.C., Section 1343(3). (Citations omitted.)'

"(3) This Court reads the Goodrich footnote to mean that it has jurisdiction to review those constitutional claims not 'previously decided' by the State Court."

The Eighth Circuit Court of Appeals gave lip service to this principle, but did not engage in any meaningful review of the Constitutional violations claimed by Petitioner. This is exactly Petitioner's point as to why this Court should grant review so as to assure him a meaningful exercise of the due process rights. The Supreme Court of Iowa held that the constitutional arguments had been waived and formally entered the Order of Disbarment recommended by the Commission. The Federal District Courts refused to hold any sort of factual hearing in the case but contented themselves with accepting carte blanche the

Order of Disbarment by the Iowa Supreme Court. The Eighth Circuit Opinion appears to give little more solace on the fact of the matter to these claims, but the end result has been the same. That end result has been a lack of any review by any Appellate Court, State or Federal, of the actions taken by the Grievance Committee against Petitioner which resulted in his disbarment. He contends strongly in this Court that in combination 42 U.S.C., Section 1983 and 28 U.S.C., Section 1343 should allow Petitioner a meaningful forum for vindication of these due process rights. At the very least, the Federal District Court should have granted such a review and the Eighth Circuit Order affirming the failure to grant such a review is error. This Court should grant certiorari so as to make the remedy under 42 U.S.C., Section 1983, for violation of Constitutional rights in a state disbarment proceeding an effective one.

There should be a remedy available to

Petitioner in the Courts of the United States. Petitioner refers this Supreme Court to one analogous case which fashioned a remedy where none appeared to exist at first glance.

> Sotomura v County of Hawaii (USDC Hawaii, 1975), 102 F. Supp. 95.

See also Getty v. Reed (US 6th CCA, 1977), 547 F.2d 971.

In Sotomura, the Court said at page 103:

> "***In this action, there is no issue of state law which requires further resolution by the state courts. The Hawaii Supreme Court made an unequivocal ruling on the relocation of plaintiff's property; this very ruling is alleged to have violated plaintiff's constitutional rights. At present, plaintiffs have no other remedies in the state court system.***"

Petitioner is confronted with the same dilemma in the petition to declare that the state court's order of disbarment violated his rights of due process and equal protection under the law.

2. The Iowa Code of Professional Responsibility as applied to Petitioner's factual situation is void for vagueness and indefiniteness in that it imports all ethical

considerations into disciplinary grounds and does not afford fair and adequate notice of prohibitive conduct which can be punished by disbarment

Petitioner has suffered the ultimate sanction of disbarment because of conduct committed in 1973 that was condemned in light of 1977 standards. At the time Petitioner herein committed the action charged against him, he could not have reasonably been held to have been placed on notice that he was doing anything wrong. Yet, the Grievance Commission treated Petitioner herein differently than other similarly situated thus violating his Equal Protection Rights and applied 1977 standards to 1973 conduct which is a grievous violation of due process rights.

The Iowa Code of Professional Responsibility draws a distinction between Ethical Considerations and Disciplinary Rules. Petitioner herein has consistently objected to the inclusion in the Complaint of

violations of ethical considerations in 1973 as the basis for disciplinary proceedings. The conduct for which Petitioner was disbarred was not a disciplinary offense at the time it occurred.

The Code has continually provided that the "Ethical Considerations are aspirational in character . . . the Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action". When Petitioner committed the action complained of, there was no disciplinary rule of any fashion against doing the action taken by Petitioner. On the contrary, the Iowa Code of Professional Responsibility for lawyers did have an Ethical Consideration touching same providing as follows:

> EC5-5. A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible

> to the charge that he unduly influenced or overreached a client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.
>
> EC5-6. A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of imporpriety.

Thus, at the time Petitioner drafted the Will, there was no Disciplinary Rule against doing this whatsoever. The record reveals that he did have an associate in his office consult with Myers independently in private before the Will was signed. Given the unique relationship between Randall and Myers stretching back into the 1940's and the circumstances of the execution of this instrument, it is impossible to conclude that Petitioner knew,

or could reasonably have known, that he was engaging in con : that could subject himself to disbarment in 1973.

However, the Iowa Supreme Court changed the rules in midstream when on December 16, 1977, the following Disciplinary Rule was promulgated:

> DR5-101. Refusing employment when the interest may impair his independent professional judgment. (b) A lawyer or the lawyer's partners or associates shall not prepare any instrument in which a client desires to name the lawyer beneficiary unless the laywer is the spouse of, son-in-law, or daugher-in-law, or is otherwise related by consanguinity or affinity within the third degree to the client.

Then, in Committee on Professional Ethics v. Behnke, 276 N.W. 2d 838 (Iowa 1979) the Iowa Supreme Court held that the lawyer violated EC5-5 by drafting a Will for a client in which he was named as a contingent beneficiary and suspended him indefinitely. Behnke was then used in the present case as the basis for a statement of the Iowa Supreme Court to the effect that a violation of EC5-5 would be unethical conduct. This is legal boot-

strapping of the highest order.

Disbarment is a quasi-criminal proceeding. In 1973, it was unforseeable that in 1977 the Iowa Judiciary would make the ethical considerations a penal provision of the Code. However, the 1977 enlargement of the penal provisions and the 1979 Behnke case was applied retroactively to Petitioner's conduct in 1973. This operates precisely in the manner of an ex post facto law such as Article I, Section 10, of the Constitution forbids. See Bouie v. Columbia, 378 U.S. 347, 352-3 (1964). The Eighth Circuit distinguishes this ex post facto character by saying this is not a criminal case but certainly the utilization of the 1977 standard to make disbarrable 1973 conduct operates to deprive Petitioner of notice that certain conduct would result in disbarment proceedings and therefore violated Petitioner's due process rights under the Fourteenth Amendment.

Petitioner refers this Court to an excellent article in 65 Iowa Law Review 1386:

"Note--Lawyer Disciplinary Standards: Broad v. Narrow Proscriptions."

In two cases cited by the author of the Note, Russell W. Damtoft, the Courts held Disciplinary Rule 7-107 unconstitutional on account of vagueness:

(1) Hirschkop v. Snead, 594 F. 2d 356, 371 (4th CCA, 1979). The Court cited Baggett v. Bullitt, 377 US 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed 2d 377, _____ (1964).

(2) Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 253 (7th CCA, 1974), cert. denied, 427 US 912 (1976).

The Chicago Council of Lawyers sued for a Declaratory Judgment and injunction against enforcement of local criminal rules and of a Disciplinary Rule sought to prohibit extra-judicial comments by attorneys in criminal and civil cases. The District Court granted a motion to dismiss. The Court of Appeals reversed and remanded the case.

Petitioner reminds this Court how unwieldy it would be for all 138 Ethical

Considerations of the present Iowa Code, modelled after the ABA Ed Wright Code, to be held of equal value in compelling compliance by lawyers and disbarring lawyers who violated any of the 138 Ethical Considerations just as for violating Disciplinary Rules.

> "Several jurisdictions have explicitely rejected the use of Ethical Considerations for disciplinary purposes. These are Indiana, Missouri, Wisconsin and arguably New York***" Damtoft, 65 Iowa Law Review 1387, Footnote 12.

Damtoft in Footnote 23, page 1389, says the Iowa Court had adopted ethical considerations as a basis for attorney discpline and cited three decisions besides Randall. It is time for this Supreme Court to take the challange and examine the Iowa Code of Professional Conduct as administered to Iowa lawyers and to hold that as such it is unconstitutional for violating rights of due process and equal protection under the law. The highest Court in these United States must act to prevent the Iowa Supreme Court from inflicting upon its lawyers including Petitioner Randall such

terrible un-American punishments and judicial edicts all reeking with gross injustice to the lawyers of Iowa.

See Connally v. General Construction Company, 269 US 385, 70 L.Ed 322, ____S. Ct. _____(1926) and the note appended at page 322.

Petitioner decries this lack of notice in the strongest terms. Changing the rules of the game in midstream is exactly the type of conduct that the due process clause should protect against. The use of the 1977 Amendment to criminalize the 1973 conduct so as to justify disbarment is deplorable. It is a violation of the due process rights of this Petitioner in the highest fashion. The Court should grant certiorari to right this due process wrong.

CONCLUSION

There were serious due process defects in the manner and method by which Petitioner lost his license to practice law. This has resulted in a deplorable end to a distinguished legal career. There should be a federal

corrective remedy for state violations of constitutional rights and 42 U.S.C., Section 1983 is that remedy. Likewise, the flagrant due process violation of using a 1977 standard to evaluate 1973 conduct is a violation of constitutional rights. This Court should grant certiorari so as to allow Petitioner a remedy for these violation.

Respectfully submitted,

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